No. 21-20202

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SCOTT EASOM; ADRIAN HOWARD; and JOHN NAU,

Plaintiffs-Appellants,

v.

U.S. WELL SERVICES, INCORPORATED,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS (No. 4:20-cv-2995)

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

Easom v. U.S. Well Services, No. 21-20202

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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CONCISE STATEMENT OF INTEREST OF AMICUS CURIAE

The Secretary of Labor administers the Worker Adjustment and Retraining Notification Act (WARN Act), 29 U.S.C. § 2101 *et seq.* Congress vested the Secretary with broad authority to "prescribe such regulations as may be necessary to carry out" the WARN Act. *Id.* § 2107(a). Pursuant to that authority, the Secretary promulgated 20 C.F.R. § 639.9, which, among other things, identifies the circumstances under which the WARN Act's "natural disaster" exception, 29 U.S.C. § 2102(b)(2)(B), excuses an employer from providing employees with the full 60 days' notice of an impending mass layoff. The district court adopted an interpretation of the exception that is at odds with the regulation. The Secretary has a strong interest in defending its regulations and in the correct interpretation and application of the WARN Act. The United States therefore files this amicus brief to aid the Court in its deliberations. *See* Fed. R. App. P. 29(a)(2).

STATEMENT OF THE ISSUE

This brief addresses the following question presented on appeal:

Whether, in accordance with the Secretary's regulation, the WARN Act's natural disaster exception applies where a mass layoff was the "direct result" of a natural disaster, or, as the district court concluded, the exception applies where a natural disaster was merely a "but for" cause of a mass layoff.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The WARN Act requires businesses that employ 100 or more employees to provide employees and state and local government authorities with 60 days' notice of a forthcoming "plant closing" or "mass layoff." *See* 29 U.S.C. § 2102(a). An employer who fails to give the required notice may be liable to each employee for back pay and benefits for each day that the required notice was not supplied, up to 60 days. *See id.* § 2104(a)(1)-(2). An employer is also subject to civil penalties for failing to provide local government officials with the required notice. *See id.* § 2104(a)(3).

The Act specifies three circumstances under which an employer may provide less than the required 60 days' notice *See* 29 U.S.C. § 2102(b). The first, known as the "faltering business" exception, *id.* § 2102(b)(1), is not relevant here. The second, known as the "unforeseeable business circumstances" exception, provides:

> An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.

Id. § 2102(b)(2)(A).

The third, known as the "natural disaster" exception, provides:

> No notice under this chapter shall be required if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States.

Id. § 2102(b)(2)(B). The Act further provides that "[a]n employer relying on this subsection [(setting out the three exceptions that allow reduction of the notice period)] shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period." *Id.* § 2102(b)(3).

Congress tasked the Secretary of Labor with administering the WARN Act. Specifically, Congress authorized the Secretary of Labor to "prescribe such regulations as may be necessary to carry out" the Act. 29 U.S.C. § 2107(a). Pursuant to that authority, the Secretary promulgated a regulation interpreting the Act's three exceptions to its notice requirement. *See* 20 C.F.R. § 639.9. With respect to the Act's natural disaster exception, the Department of Labor's regulation provides:

> The "natural disaster" exception in section 3(b)(2)(B) of WARN applies to plant closings and mass layoffs due to any form of a natural disaster.
>
> (1) Floods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature are natural disasters under this provision.
>
> (2) To qualify for this exception, an employer must be able to demonstrate that its plant closing or mass layoff is a direct result of a natural disaster.
>
> (3) While a disaster may preclude full or any advance notice, such notice as is practicable, containing as much of the information required in § 639.7 as is available in the circumstances of the disaster still must be given, whether in advance or after the fact of an employment loss caused by a natural disaster.
>
> (4) Where a plant closing or mass layoff occurs as an indirect result of a natural disaster, the exception does not apply but the "unforeseeable business circumstance" exception described in paragraph (b) of this section may be applicable.

Id. § 639.9(c).

B. District Court Proceedings

Plaintiffs in this case are former employees of U.S. Well Services, Inc., a hydraulic fracturing company. *Easom v. U.S. Well Servs., Inc.*, No. CIV H-20-2995, 2021 WL 1092344, at *2 (S.D. Tex. Mar. 19, 2021). In late March 2021, U.S. Well informed plaintiffs that they were laid off, effective immediately, due to "unforeseeable business circumstances resulting from a lack of available customer work caused by the significant drop in oil prices and the unexpected adverse impact that the Coronavirus has caused." *Id.* Plaintiffs filed a class action complaint alleging WARN Act violations. The parties cross-moved for summary judgment. U.S. Well argued, as relevant here, that it was not required to provide notice under the WARN Act's natural disaster exception, citing the COVID-19 pandemic as the relevant disaster. *Id.* at *3. Plaintiffs asserted that the natural disaster exception was inapplicable because the pandemic did not qualify as a natural disaster under the Act and, in any event, the layoff was not the direct result of the pandemic, as the Department of Labor's regulation requires. *Id.* at *7, *11, *12.

The district court denied the parties' cross motions. The court concluded that the pandemic qualified as a "natural disaster" under the statute, rejecting plaintiffs' arguments to the contrary. *Easom*, 2021 WL 1092344, at *7-11. The court also rejected plaintiffs' argument that U.S. Wells was required to provide as much notice as was practicable, assuming the natural disaster exception applied. *Id.* at *5-7.

The district court further concluded that, contrary to the Department of Labor's regulation, the WARN Act did not require that a mass layoff be the "direct result" of a natural disaster. *Easom*, 2021 WL 1092344, at *11-14. The court emphasized that the WARN Act requires that the layoff be "due to" a natural disaster. *Id.* at *11 (quoting 29 U.S.C. § 2102(b)(2)(B)). The court then found that the phrase "due to" unambiguously refers solely to "but for" causation and does not incorporate proximate causation. *Id.* at *11-14. In other words, the court concluded that, provided that a natural disaster was a "but for" cause of a layoff—no matter how remote in time or indirect in nature—the exception applies and the employer is not required to provide notice of the layoff.

The court declined to grant summary judgment to U.S. Well, however. The court concluded that it was unclear whether the pandemic was even a "but for" cause of the layoffs, given that oil prices (the main driver of the demand for U.S. Well's services) had been declining precipitously for non-pandemic-related reasons in the months before the layoff. *Easom*, 2021 WL 1092344, at *14-15.

Plaintiffs moved for reconsideration or, in the alternative, for an order certifying the district court's decision for interlocutory appeal. *Easom*, 2021 WL 1092344, at *15. In seeking reconsideration, plaintiffs noted, among other things, that U.S. Well had not challenged the appropriate standard of causation under the WARN Act or argued that the WARN Act's natural disaster exception did not require

proximate causation. *Id.* at *11 n.11. Instead, U.S. Well had argued that the layoff was a direct result of the pandemic.

The district court denied the motion for reconsideration. The court concluded that U.S. Well had "argued for but-for causation at oral argument," thus sufficiently raising the issue. *Easom*, 2021 WL 1092344, at *11 n.11. The court granted plaintiffs' request that it certify its order for interlocutory review. In so doing, the court identified two controlling questions of law that warranted interlocutory review:

1. Does COVID-19 qualify as a natural disaster under the WARN Act's natural-disaster exception, 29 U.S.C. § 2102(b)(2)(B)?

2. Does the WARN Act's natural-disaster exception, 29 U.S.C. § 2102(b)(2)(B), incorporate but-for or proximate causation?

Id. at *15-16.

This Court subsequently granted plaintiffs' petition for interlocutory review.

SUMMARY OF ARGUMENT

With the goal of providing workers and state and local government with time to prepare for a mass layoff, the WARN Act requires employers to provide at least 60 days' notice of an impending layoff. The Act provides three circumscribed exceptions to the 60-day notice requirement. One such exception is when a mass layoff is "due to" a natural disaster. 29 U.S.C. § 2102(b)(2)(B). The Secretary of Labor promulgated a regulation interpreting this natural disaster exception as applying where a layoff is

the "direct result" of a natural disaster. Because the Secretary's interpretation is, at a minimum, reasonable, it is entitled to deference.

In requiring that a mass layoff be the "direct result" of a natural disaster, the Department of Labor's regulation comports with the text and purpose of the WARN Act. This Court has emphasized that the Act's exceptions to its foundational 60-days' notice requirement are to be "narrowly construed." *Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dep't Stores, Inc.*, 15 F.3d 1275, 1282 (5th Cir. 1994). The Secretary's "direct result" requirement appropriately cabins the reach of the natural disaster exception. It ensures that an employer cannot evade the Act's advance notice requirements simply because a layoff has an attenuated connection to a natural disaster, while at the same time providing relief to employers who are forced to close a plant or layoff a large number of employees as a direct result of a natural disaster.

The Secretary's interpretation also follows the Act's text and structure. In specifying that "no notice" shall be required where a layoff is due to a natural disaster, Congress understood the exception as applying where advance notice is infeasible as a general matter. The Secretary's interpretation accords with that intent. Where a natural disaster directly causes a layoff—such as where a flood destroys an employer's place of business—advance notice of the layoff is not likely to be practicable. Where a natural disaster indirectly leads to a layoff—such as where a disaster causes a reduction in demand for an employer's product—some amount of advance notice is likely to be practicable.

The Secretary's interpretation also harmonizes the natural disaster exception and the Act's unforeseeable business circumstances exception. As the Department of Labor's regulation expressly recognizes, the unforeseeable business circumstances exception may apply where a natural disaster leads indirectly to a layoff. By interpreting the natural disaster exception to apply where a layoff is the direct result of a natural disaster, the Secretary ensured that the natural disaster exception works in concert with the unforeseeable business circumstances exception and does not nullify it in cases where an unforeseeable business circumstance, not a natural disaster, is the direct cause of a mass layoff.

ARGUMENT

The WARN Act requires most employers to provide 60 days' notice of a forthcoming mass layoff or plant closure. *See* 29 U.S.C. § 2102(a). The Act provides an exception to that requirement where the "plant closing or mass layoff is due to any form of natural disaster." *Id.* § 2102(b)(2)(B). Pursuant to its congressionally delegated authority, the Department of Labor issued a regulation interpreting the ambiguous phrase "due to any form of a natural disaster" to require that the mass layoff or plant closure be the "direct result" of a natural disaster. 20 C.F.R. § 639.9(c). The Department of Labor's interpretation is consistent with the natural disaster exception's text, context, and purpose. The Secretary's interpretation is the most natural reading of the statute, and is, at a minimum, a reasonable one. The regulation

is therefore entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

THE DEPARTMENT OF LABOR'S REASONABLE INTERPRETATION OF THE NATURAL DISASTER EXCEPTION'S CAUSATION REQUIREMENT IS ENTITLED TO DEFERENCE

To determine whether an agency's interpretation of a statute it is tasked with administering is entitled to deference, courts follow the familiar two-step framework set forth in *Chevron*. *See Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723, 730 (5th Cir. 2018). At step one, "applying the ordinary tools of statutory construction, the court must determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* (quoting *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013)). If "the statute is silent or ambiguous with respect to the specific issue, the question for the court at the second step is whether the agency's answer is based on a permissible construction of the statute." *Id.* (quoting *City of Arlington*, 569 U.S. at 296). "If both criteria are met, that is, [i]f a statute is ambiguous, and if the implementing agency's construction is reasonable, then *Chevron* requires a federal court to accept the agency's construction of the statute." *Id.* (quoting *Elgin Nursing & Rehab. Ctr. v. U.S. Dep't of Health & Human Servs.*, 718 F.3d 488, 492 n.3 (5th Cir. 2013)).

The Secretary's regulation interpreting the natural disaster exception's causation requirement satisfies both criteria. The statutory phrase requiring that a mass layoff

be "due to" a natural disaster is ambiguous, and the Secretary reasonably concluded that the natural disaster exception applies where a mass layoff is the "direct result" of a natural disaster, such as where a flood destroys an employer's plant. *See* 20 C.F.R. § 639.9(c). Accordingly, the regulation is entitled to deference.

A. The statutory phrase "due to" is ambiguous.

In requiring that a mass layoff be "due to" a natural disaster in order for the natural disaster exception to apply, 29 U.S.C. § 2102(b)(2)(B), Congress did not unambiguously define the required causal connection between the layoff and the natural disaster. To the contrary, as numerous courts have recognized,

> [t]he phrase "due to" is ambiguous. The words do not speak clearly and unambiguously for themselves. The causal nexus of 'due to' has been given a broad variety of meanings in the law ranging from sole and proximate cause at one end of the spectrum to contributing cause at the other.

U.S. Postal Serv. v. Postal Regulatory Comm'n, 640 F.3d 1263, 1268 (D.C. Cir. 2011) (quoting *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1100 (10th Cir. 1999)); *see also Adams v. Director, OWCP*, 886 F.2d 818, 821 (6th Cir. 1989). Because the scope of the natural disaster exception's "due to" causation standard is ambiguous, "Congress left it to the [Secretary] to determin[e] how closely" the connection between the natural disaster and the layoff must be to trigger the exception. *Alliance of Nonprofit Mailers v. Postal Regulatory Comm'n*, 790 F.3d 186, 193 (D.C. Cir. 2015). For the reasons explained *infra* Part B, the Secretary reasonably concluded that the layoff must be the "direct result" of the natural disaster.

The district court erred in concluding that the phrase "due to" unambiguously refers only to "but for" causation and does not incorporate a proximate cause requirement, such as the Secretary's "direct result" standard. *Easom v. U.S. Well Services, Inc.*, No. CIV H-20-2995, 2021 WL 1092344, at *11-14 (S.D. Tex. Mar. 19, 2021). The district court cited no case in which a court has concluded that the phrase "due to" is unambiguous and refers solely to "but for" causation. The court, in particular, failed to identify any cases (let alone a uniform collection of cases) interpreting "due to" in the limited manner the court proposed in the years predating the enactment of the WARN Act, such that Congress might be presumed to have adopted that construction. Moreover, as noted above, numerous courts have recognized that the phrase "due to" is ambiguous. *See supra* p. 10. One court did so in a decision roughly contemporaneous with the enactment of the WARN Act, underscoring that phrase lacked a settled meaning during the relevant time period. *See Adams*, 886 F.2d at 821.

In fact, in certain contexts, this Court and others have "concluded that 'due to' should be read as *requiring* a proximate cause analysis." *Crose v. Humana Ins. Co.*, 823 F.3d 344, 350 (5th Cir. 2016) (emphasis added); *see also Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1006 (2d Cir. 1974) (stating that the phrase "due to or resulting from" "clearly refers to . . . proximate cause"). The district court's conclusion that Congress understood the phrase "due to" as unambiguously requiring only "but for" causation cannot be squared with precedent.

The district court's interpretation of the natural disaster exception's causation requirement is also at odds with the exception's statutory context. Enacted in "response to the extensive worker dislocation that occurred in the 1970s and 1980s," *Hotel Emps. & Rest. Emps. Int'l Union Local 54 v. Elsinore Shore Assocs.*, 173 F.3d 175, 182 (3d Cir. 1999), the WARN Act requires employers to provide workers, that state dislocated worker office, and the chief elected official of the relevant local government with notice of an impending mass layoff or plant closing, 29 U.S.C. § 2102(a). The Act is thus designed to ensure that workers have sufficient time "to adjust to the prospective loss of employment, to seek and obtain alternative jobs and . . . to enter skill training or retraining that will allow these workers to successfully compete in the job market." *Sides v. Macon Cty. Greyhound Park, Inc.*, 725 F.3d 1276, 1281 (11th Cir. 2013) (quoting 20 C.F.R. § 639.1(a)); *Hotel Employees*, 173 F.3d at 182 ("The thrust of WARN is to give fair warning in advance of prospective plant closings."). The Act is likewise designed to provide state and local government agencies with advance notice of layoff or plant closure so those entities may timely prepare and initiate worker outreach and other support programs. *See* 20 C.F.R. § 639.1(a).[1] Because the WARN Act's exceptions to its notice requirements run

[1] Notice to the state dislocated worker unit and the local government allows those bodies to prepare services for the soon-to-be laid off workers. Those services, which are funded in part by the Department of Labor, include rapid response programs, job training, job search support, and career counseling. *See.* U.S Dep't of Labor, Employment and Training Administration, *WIOA Dislocated Worker Program*, https://go.usa.gov/xMmhG, (last visited Oct. 6, 2021).

counter to the Act's fundamental design, they are "narrowly construed." *Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dep't Stores, Inc.*, 15 F.3d 1275, 1282 (5th Cir. 1994); *see also San Antonio Sav. Ass'n v. Commissioner*, 887 F.2d 577, 586 (5th Cir. 1989) (noting the "general principle of narrow construction of exceptions").

The district court's interpretation, by contrast, would improperly create an exception to the Act's notice requirement that is potentially expansive in scope. The "but-for" causation standard "can be a sweeping standard." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020); *see also United States v. George*, 949 F.3d 1181, 1187 (9th Cir. 2020) ("But-for causation is a relatively undemanding standard."). "'[B]ut for' events can be very remote," *Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co. Kg.*, 295 F.3d 59, 65 (1st Cir. 2002), and may contribute only modestly to the end result, *General Refractories Co. v. First State Ins.* Co, 855 F.3d 152, 161 (3d Cir. 2017) ("'But for' causation is a *de minimis* standard of causation, under which even the most remote and insignificant force may be considered the cause of an occurrence."). Thus, if "but for" causation is all the WARN Act's natural disaster exception requires, an employer may be excused from providing 60 days' advance notice of a layoff even in circumstances where the relevant natural disaster occurred months earlier, its effects on the employer's business are modest and were known to the employer for a significant period of time, and the employer could readily have provided notice of the forthcoming layoff. Such a potentially sweeping loophole is inconsistent with the statute's text and purpose, and could not have been what Congress intended. *See, e.g.*,

Hotel Employees, 173 F.3d at 182 (concluding that government-ordered plant closings do not exempt employers from the WARN Act's notice requirements because, among other things, Congress intended the WARN Act to apply whenever an employer knows of an impending layoff, regardless of its cause).

The district court's interpretation of the exception's causation requirement is also at odds with other principles of statutory interpretation. Congress is "understood to legislate against a background of common-law . . . principles." *Samantar v. Yousuf*, 560 U.S. 305, 320-21 & n.13 (2010). "Thus, where a common-law principle is well established, . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Energy Intel. Grp., Inc. v. Kayne Anderson Cap. Advisors, L.P.*, 948 F.3d 261, 270 (5th Cir. 2020); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014) ("Congress, we assume, is familiar with the common-law rule and does not mean to displace it *sub silentio*.").

The "requirement of proximate causation" is a "venerable" and "well established" common-law principle that Congress is presumed to incorporate into causation requirements. *Lexmark*, 572 U.S. at 132; *see also id.* (citing cases in which the Court has presumed that Congress intended to incorporate a proximate-cause requirement); *Paroline v. United States,* 572 U.S. 434, 446 (2014) ("Given proximate cause's traditional role in causation analysis, this Court has more than once found a proximate-cause requirement built into a statute that did not expressly impose one.")

(citing cases). Congress's use of the general phrase "due to" in describing the natural disaster exception's causal component does not in any way indicate Congress's intent to negate the traditional common-law proximate-cause requirement. Far from running contrary to Congress's statutory purpose in enacting the WARN Act, a proximate-cause requirement furthers Congress's intent by appropriately cabining the circumstances in which an employer may evade the Act's 60-day notice requirement.

The district court gave two reasons for declining to adopt the well-settled presumption that Congress intends to incorporate proximate cause when imposing a causation requirement. *Easom*, 2021 WL 1092344, at *13. First, the court found that "Congress signaled its intention to eliminate proximate causation by the using the words 'due to' rather than 'directly due to.'" *Id.* The court's analysis gets the presumption backwards. Congress is presumed to adopt proximate causation unless it states otherwise. It is not presumed to "eliminate proximate causation" unless it expressly adopts it. As the Supreme Court has emphasized, it regularly finds a "proximate-cause requirement built into . . . statute[s] that did not expressly impose one." *Paroline,* 572 U.S. at 446.

The district court next concluded that the presumption in favor of a proximate cause requirement did not apply because, allegedly unlike in other circumstances, "proximate cause serves no liability-limiting function" in the context of the natural disaster exception. *Easom*, 2021 WL 1092344, at *13. This reasoning too is flawed. As discussed above, a proximate-cause requirement limits the scope of the natural

disaster exception by narrowing the range of circumstances in which an employer may evade the Act's foundational notice requirements. Thus, as in other circumstances, a proximate cause requirement serves an important limiting function in the context of the WARN Act's natural disaster exception.

In concluding that the statutory phrase "due to" incorporates only "but for" causation, the district court noted that "due to" is synonymous with "because of" and then cited cases interpreting "because of" to incorporate "but for" causation. *Easom*, 2021 WL 1092344, at *11. The district court's analysis is unavailing. Dictionary definitions of "due to" do not clarify its ambiguity. For example, "due to" is synonymous not only with "because of," but also with phrases such as "caused by" and "as a result of." *See, e.g.*, *Due to*, The Oxford English Dictionary 1105 (2d ed. 1989) ("due to" means "caused by"); *Due to*, Oxford English Dictionary Online (June 2021) ("caused by"; "as a result of"); *Due to*, Merriam Webster Online Dictionary (Sept. 2021) ("as a result of"). Courts have regularly interpreted such phrases as incorporating proximate causation. *See, e.g.*, *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 536 (1995) ("The Act uses the phrase 'caused by,' which more than one Court of Appeals has read as requiring what tort law has traditionally called 'proximate causation.'"); *Robers v. United States*, 572 U.S. 639, 645 (2014) ("as a result of" denotes proximate cause); *United States v. Monzel*, 641 F.3d 528, 536 (D.C. Cir. 2011) ("By defining 'victim' as a person harmed 'as a result of' the defendant's

offense, the statute invokes the standard rule that a defendant is liable only for harms that he proximately caused.").

The district court also over-read the cases that have concluded that the phrase "because of" incorporates "but for" causation. While those cases stand for the proposition that "because of" incorporates the traditional "but for" causation requirement, they did not hold that "because of" necessarily excludes proximate causation, "but for" causation's traditional companion. *See Burrage v. United States*, 571 U.S. 204, 211 (2014) ("The law has long considered causation a hybrid concept, consisting of two constituent parts: actual [or 'but-for'] cause and legal [or 'proximate'] cause."). In *Burrage*, for example, the Supreme Court expressly declined to reach the question whether the relevant statute imposed a proximate cause requirement in addition to a "but for" requirement. 571 U.S. at 210. In *Bostock*, 140 S. Ct. at 1739, and *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013), the Supreme Court similarly addressed only the question whether the relevant statute incorporated a "but for" causation requirement. Neither decision mentions proximate causation, let alone addresses the question whether Congress intentionally overrode the traditional proximate cause requirement.

Finally, the district court found it significant that Congress considered a proposed version of the natural disaster exception that would have described the exception as applying when a layoff is "due, *directly or indirectly*, to any form of natural disaster," but ultimately enacted the exception without the "directly or indirectly"

language. *Easom*, 2021 WL 1092344, at *12 (quoting 134 Cong. Rec. S8686–89, 358 (daily ed. June 28, 1988)). The Act's legislative history suggests the language may have been dropped due to confusion over the meaning of the terms "directly" and "indirectly." *See, e.g.*, 134 Cong. Rec. S8686 (remarks of Sen. Dole) (explaining that the language was removed because "there was some question what 'directly' means and what 'indirectly' means"); *id.* at S8687 (remarks of Sen. Metzenbaum) (objecting to the inclusion of "indirectly" because " 'indirectly' is such an amorphous kind of term you cannot tie it down"); *id.* at S8689 (remarks of Sen. Dole) (agreeing that the removal of "indirectly" was a "good" suggestion given its amorphous character). The most logical inference to be drawn from the failed amendment is that Congress chose the ambiguous phrase "due to" on the understanding that the Secretary of Labor and courts would establish the contours of the exception's causation requirement.

B. The Department of Labor's interpretation is at least reasonable.

The Secretary of Labor reasonably interpreted the WARN Act's natural disaster exception as applying where a mass layoff or plant closure is the "direct result" of a natural disaster. *See* 20 C.F.R. § 639.9(c). The Secretary's interpretation is consistent with the Act's "central focus," *Alliance of Nonprofit Mailers*, 790 F.3d at 193, on ensuring that workers and state and local governments receive adequate notice of a forthcoming mass layoff, so that they may prepare for that eventuality, *see Sides*, 725 F.3d at 1281; 20 C.F.R. § 639.1. By requiring a direct connection between the natural disaster and the mass layoff, the Secretary's interpretation ensures that the exception

will not permit employers to rely on the lingering or remote effects of a natural disaster to evade the WARN Act's notice requirements where notice would have been practicable. At the same time, it provides relief to employers where a natural disaster has a direct and immediate adverse impact on an employer's business, such that an employer had to immediately shut its plant or layoff many of its employees.

The Department of Labor's regulation also accords with the statute's text. The WARN Act states that "[n]o notice . . . shall be required" where a mass layoff is due to a natural disaster. 29 U.S.C. § 2102(b)(2)(B). That Congress specified that "no notice" is required under the natural disaster exception indicates that Congress understood the exception as applying in circumstances where supplying advance notice of a mass layoff or plant closure is likely to be impracticable. *See* H.R. Rep. No. 100-285, at 34 (1987) (suggesting that a precursor to the natural disaster exception covered situations where notice was "impossible").

The regulation's "direct result" requirement is consistent with that congressional intent. Where a layoff results directly from a natural disaster, such as where a natural disaster destroys the employer's factory or place of business in a short period of time, advance notice of a layoff is likely to be impracticable. Conversely, where a natural disaster only indirectly results in a layoff—such as where a natural

disaster reduces the demand for an employer's product, eventually leading to a layoff—some amount of advance notice is likely to be feasible.[2]

The Secretary's interpretation also harmonizes the natural disaster exception with the WARN Act's unforeseeable business circumstances exception. As the Department's regulation recognizes, the Act's unforeseeable business circumstances exception, 29 U.S.C. § 2102(b)(2)(A), covers situations where a natural disaster indirectly causes a layoff by, for example, causing "an unanticipated and dramatic major economic downturn" or a "sudden, dramatic, and unexpected" loss of business for the employer. 20 C.F.R. § 639.9(b)(1); *see also id.* § 639.9(c)(4) (emphasizing that "[w]here a plant closing or mass layoff occurs as an indirect result of a natural disaster, . . . the 'unforeseeable business circumstance' exception . . . may be applicable"). By requiring that a mass layoff be the "direct result" of a natural disaster, the Secretary ensured that the natural disaster and unforeseeable business circumstances exceptions complement one another and that the unforeseeable business circumstances exception is the properly invoked exception when an unforeseeable business circumstance (such as an unexpected and sudden drop in demand for an employer's services) causes a

[2] In 29 U.S.C. § 2102(b)(3), Congress required employers "relying on" any of the Act's three exceptions, including the natural disaster exception, to "give as much notice as is practicable." Ambiguity therefore exists over whether an employer must provide notice of a layoff when relying on the natural disaster exception. The Secretary, in regulations promulgated at 20 C.F.R. § 639.9(c)(3), interpreted this ambiguity to require such notice as is practicable, even if such notice occurs "after the fact of an employment loss caused by a natural disaster."

mass layoff. In other words, the Secretary's interpretation assures that the natural disaster exception does not extend so far that the unforeseeable business circumstances exception is lost whenever a layoff can be traced in some way to a natural disaster.

Differences in the text of the two exceptions lend further support to the Secretary's reading of the interplay between the two. As the district court noted, *Easom*, 2021 WL 1092344, at *14, Congress used the phrase "caused by" in describing the unforeseeable business circumstances exception's causation standard. *See* 29 U.S.C. § 2102(b)(2)(A). The district court then concluded that the phrase "caused by" imposes a narrower, more strict causation standard than "due to." *See Easom*, 2021 WL 1092344, at *14. The opposite conclusion, however, is far more plausible in context. As explained above, Congress understood the natural disaster exception as applying in a narrow range of circumstances—i.e., where advance notice is generally not practicable. *See supra* pp. 19-20. The Secretary thus sensibly read "due to" as requiring that a layoff be the "direct result" of a natural disaster, while recognizing that a layoff indirectly caused by a natural disaster might be covered by the broader unforeseeable business circumstances exception.

Although this Court need not resort to the natural disaster exception's limited legislative history, that history also lends support to the Secretary's interpretation of the exception's causation requirement. The natural disaster exception was added to the WARN Act during a Senate floor debate. *See* 134 Cong. Rec. at S8686–89. As

described above, a proposed version of the exception provided that it applied where a layoff was "due, directly or indirectly, to" a natural disaster. *See id.* The WARN Act's primary sponsor, Senator Metzenbaum, objected to the word "indirectly," deeming it too "amorphous" and likely to sweep too broadly. *See id.* at S8687. Ultimately, the Senate agreed to include the amendment without the "directly or indirectly" modifier. Senator Metzenbaum made clear, however, that the exception as enacted was not intended to apply where "notice can be given." *Id.* He further emphasized that the exception did not provide "carte blanche" to employers to evade the Act's notice requirements merely because a drought or other natural disaster had "some impact" on the employer's business. *See id.* For the reasons explained above, the Department's "direct result" standard comports with that understanding of the exception, as it limits the exception's reach to situations where a natural disaster has a direct impact on an employer's business and where advance notice of a layoff is likely infeasible.

* * *

Because it concluded that the natural disaster exception did not incorporate a proximate causation requirement, the district court did not consider whether the layoff at issue was the "direct result" of the pandemic. The court's analysis suggests that the layoff was the direct result of "an economic downturn in the oil business," which may have been caused in part by the COVID-19 pandemic. *Easom*, 2021 WL 1092344, at *14. The court's reasoning thus appears to conclude that the layoff

resulted only indirectly from the pandemic. If that is the case, then the natural disaster exception would not apply, but the unforeseeable business circumstances might. The district court should be so instructed on remand.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I also certify that I will file paper copies with the Court, via Federal Express overnight delivery, when the court requests them.

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GERARD SINZDAK

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief was prepared using Microsoft Word 2010 and complies with the type and volume limitations set forth in Rule 32 of the Federal Rules of Appellate Procedure. I further certify that the font used is 14 point Garamond, for text and footnotes, and that the computerized word count for the foregoing brief (excluding exempt material) is 5,732 words.

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